IN THE

Supreme Court of the United States.

OCTOBER TERM, [illegible] 1925

No. [illegible] 51

THE BUCKEYE COAL AND RAILWAY COMPANY, ET AL.,

Appellants,

vs.

THE HOCKING VALLEY RAILWAY COMPANY, CENTRAL UNION TRUST COMPANY OF NEW YORK, UNITED STATES OF AMERICA, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF OF APPELLANTS AGAINST MOTION OF APPELLEES TO DISMISS APPEAL.

WILLIAM BURRY,
WILLIAM O. HENDERSON,
Counsel for Appellants.

April, 1925.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

No. 368

THE BUCKEYE COAL AND RAILWAY COMPANY, ET AL.,

Appellants,

vs.

THE HOCKING VALLEY RAILWAY COMPANY, CENTRAL UNION TRUST COMPANY OF NEW YORK, UNITED STATES OF AMERICA, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF OF APPELLANTS AGAINST MOTION OF APPELLEES TO DISMISS APPEAL.

The motion and accompanying brief are founded on the theory that, although appellants had a right to intervene and file their petition herein and the court had a right to pass finally on the petition, yet appellants had no right to appeal from that decision.

No technical grounds are alleged for the motion, no objection is made to the manner in which the appeal was taken, and the motion seems to deal with the merits of the case. It does not appear exactly how appellees, while conceding the propriety of the intervening petition and insisting upon the decision and judgment rendered thereon, still insist that there is no right to appeal although the statute expressly allows such an appeal.

I.

Appellees at no time and in no way objected in the court below to appellants filing the intervening petition. They answered it on the merits and it is now too late to move to dismiss the appeal either because of the manner of such intervention or on account of an erroneous assumption that interveners were seeking to act on behalf of the public.

Appellees do not now object to the intervention, their objection being simply to the appeal because, as they say, appellants "are without standing to prosecute an appeal" (Brief, p. 1). Appellants presented to the court below their intervening petition with their prayer for leave to file the same, and upon examination the court ordered it to be filed. It was then filed. The court also ordered appellees and the United States District Attorney to answer the petition. (Rec., 11-12). The movers answered the petition without any objection to the intervention (Rec., 12, 27). The United States, plaintiff in the original action, neither answered the petition nor objected to the intervention. Appellees answered the petition to the merits.

On June 5, 1922, appellants' petition was argued and submitted to the court upon the petition and the answers of the movers and still without any objection to the intervention (Rec., 62). And appellees, and also the United States, have never at any time or in any way objected to the propriety of the intervention or to the filing of appellants' petition.

It must be presumed that the trial court, upon examination of appellants' petition, found good and sufficient ground for it, as otherwise the court would not have al-

lowed the petition to be filed. No abuse of discretion of the court below in allowing and ordering the intervention is alleged. Until clear abuse of such discretion is shown, we take it this court will not hold that the action of the trial court was unauthorized, illegal or improper.

It is not altogether clear upon the present record that the appellant, the Buckeye Coal & Railway Company, was a party to the original action, when it, with its co-intervener, intervened by their petition filed December 6, 1921 (Rec., 7). The fair inference from the present record is that it was such a party. It was not one of the original parties (Rec., 117). But many parties were made to the original action after it was begun, the addition of some of whom are shown by the present record, including appellee, the Central Union Trust Company (Rec., 194).

It is a fair inference from facts appearing in the record that the Buckeye Company was a party to the original action before the intervention. It is named or referred to in the original opinion and decree of the court below as one of the coal companies whose stock was owned and which was dominated by the Hocking Valley Railway Company (Rec., 121, 124, 171); as having joined with the Hocking Valley Company in the first consolidated mortgage which contains the royalty provision, the main subject matter of the present litigation (Rec., 129, 171, 173), and as a company leased by the Sunday Creek Company, an original defendant (Rec. 178). It is mentioned in the opinion of the court below of July 30, 1915, on the petition of the Hocking Valley Company to approve the sale of its stock and other stocks and bonds (Rec., 184, 188). It is mentioned in the petition of the United States, filed Oct. 9, 1915, to require the sale of certain stocks and bonds owned by the Hocking Valley Company and another railway company, in order to

effectuate the original decree to wholly divorce the railway companies from all interests, direct or indirect, in any of the coal properties in which the Sunday Creek Company was interested, as one whose properties were controlled by the Sunday Creek Company under lease (Rec., 189, 190), and as one whose stock was owned by the Hocking Valley Company and pledged to the Central Union Trust Company (Rec., 191). It is mentioned in the answers of the Hocking Company and the Trust Company to that petition (Rec., 192, 194, 195, 196, 199). It is also named in the order entered May 19, 1916, upon that petition and the answers (Rec., 201, 202, 203, 204, 205, 206, 207). And it is also mentioned in the petition and motion of the Hocking Valley Company and in the order entered thereon by which the stock of the Buckeye Company, together with other stock, was sold with the approval of the court to John S. Jones (Rec., 209, 210, 211, 212).

The property of the Buckeye Company was certainly involved in this suit from the beginning. A description of the formation of the company and where its property came from appears in the main opinion in this case (Rec., 124). When the United States filed a supplemental petition in October 1915, (Rec., 189) its property and stock were described and complainant prayed that the stock be sold. The Buckeye Company and its property are described in the main opinion announced herein on March 14, 1914. From the very beginning and up till the present date the property of the Buckeye Company has been involved in this litigation and orders have been made concerning it and concerning its capital stock.

The other appellant, the Sunday Creek Coal Company, is a new company incorporated in April, 1919, and was not a party to the original action (Rec., 249, 251), but it

succeeds to the Sunday Creek Company, which was an original defendant.

But whether the Buckeye Company was or was not a party to the original action before the present intervening petition, is an unimportant question, in view of the fact that the intervention was made and allowed under the provisions of Equity Rule 37, then in force, which provides:

> "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

The intervention complied fully with the condition of the latter clause of that provision in that it was entirely in subordination to, and in recognition of, the propriety of the main proceeding. The prayer of the present petition is for specific relief sought by the petitioners in their own interest, which relief was entirely in subordination to, and in recognition of, the propriety of the main proceeding, and is also "for such other and appropriate order therein as will effectively carry out the purpose and effect of the main decree entered herein" (Rec., 11). So that, when the court below passed upon appellants' petition as one entitling them to intervene and allowed the petition to be filed, the status of appellants as parties to the action below with all the rights and privileges of the other parties to that action, including the right of appeal, became fixed. That action being one under the Expedition Act of Feb. 11, 1903 (Rec., 1), appellants acquired the right of direct appeal to this court. Their appeal has rightfully and properly been taken and perfected.

Petition of the United States.

The United States without answering the petition of appellants, on November 21, 1922, after the submission of appellants' petition but before decision, filed by leave of the court its supplemental petition (Rec., 62, 72). Afterwards, on January 27, 1923, the court ordered appellants and appellees (except the United States) to answer that supplemental petition (Rec., 72). It was so answered (Rec., 73, 77, 93). That supplemental petition was argued and submitted June 8, 1923 (Rec., 109), and the court then had both petitions under advisement.

Both cases were decided by the same opinion and judgment (Rec., 109, 115).

Appellants duly appealed from the judgment against them for the errors assigned (Rec., 17). The United States did not appeal from the judgment against it.

The "proceedings" in the State Courts referred to were not begun till April 21, 1919 (Rec., 25, 41), long after the Federal Court had acquired jurisdiction of appellees, appellants and the subject matter of the original action, which prior jurisdiction the Federal Court still holds over and against the subsequent jurisdiction of the State Courts. The decision of the State Courts in such "proceedings" does not bar or disturb the jurisdiction and authority of the Federal Court in carrying out the purpose and intent of the original decree in the original action.

The case of *United States* v. *Northern Sec. Co. et al.*, 128 Fed., 808, cited by opposing counsel at pp. 9 and 12 of their brief, was heard and decided by the trial court upon the application to intervene, and particularly not after the intervening petition had been presented to the

lower court on an application for leave to file it and had been examined by that court and ordered filed and the defendants thereto ruled to answer it; and still further particularly not after the intervening petition had been answered and decided on the merits. Opposing counsel conveniently omit from the extract quoted by them from the opinion in the case cited that significant part of it wherein the court said: "We consider and determine this application upon the petition for leave to intervene alone." This means that the petition must itself show sufficient cause for intervention before leave to file the same will be granted. Therefore, if such a petition, with prayer for leave to file the same, is presented to and examined by the trial court and that court orders it filed and orders the defendants thereto to answer the same, it is conclusive on an appellate court that good and sufficient cause was shown for filing the petition,—certainly so until it is clearly shown that the order granting the intervention was an abuse of discretion.

Appellees do not question the action of the court below in allowing the intervening petition to be filed and in finally passing upon its merits. They do not question the jurisdiction of that court nor the finality of its judgment. They rely on that judgment and will hereafter claim it as *res judicata*. How then can they now insist that that judgment of the District Conrt cannot be reviewed? As appellees concede our right to make the present intervention and to obtain a final decision thereon, why should they deny our right to this appeal from that decision?

For the foregoing reasons the motion should be overruled.

II.

Appellants intervened chiefly because of their own important financial interest and only incidentally as informers as to the public interest. It is not true that they intervened "solely as informers to call attention to an alleged public interest" and "acquired no status as litigants." They however rely upon the main decree, entered March 14, 1914.

Opposing counsel erroneously assume and repeat that appellants intervened solely to protect an alleged public interest. Nor is it true, as stated by counsel (p. 9) that "Appellants' pleadings, expressly admit their private controversy with the appellees was previously disposed of in proceedings in the Ohio State Courts." And that is not otherwise admitted. The proceedings in the State Courts and their decisions are shown and admitted, but these do not "*dispose of*" appellants' "private controversy with the appellees," except so far as such decisions may rightfully go. Those proceedings did not "dispose of" any controversy then pending in the Federal Court and within its jurisdiction.

The Federal District Court in Ohio acquired and held first, prior and continuing jurisdiction over all the parties and over the subject matter of the "private controversy" and of all controversies within the subject matter of the original suit in which the intervention was made. The opinion of that Federal Court was rendered December 28, 1912, and its decree was entered March 14, 1914 (erroneously printed at page 109 "1924") (Rec., 109, 165, 183), long before the jurisdiction of the State Courts was invoked. Federal jurisdiction was acquired when the original bill in equity was filed in the Federal

Court. Jurisdiction of the subject matter of the original suit was expressly reserved by the Federal Court at the end of its decree in these words:

> "(8) That jurisdiction of this cause be retained by this court for the purpose of making such other and further orders and decrees as may be necessary to the due execution of this decree and the complete dissolution of the combination and monopoly herein condemned."

The Federal Court, in its note on the margin of its supplementary order of May 19, 1916, to enforce the carrying out of its main decree, said (Rec., 206):

> "The jurisdiction retained was for the purpose of making not only such further orders and decrees as might be necessary to the due execution of the decree, but also to the complete dissolution of the combination and monopoly therein condemned. It certainly cannot be successfully denied that jurisdiction of such a case as this may and ought to be retained until the decree is fully and effectively enforced, and the condemned monopoly and combination completely dissolved."

And that court, in its opinion of June 30, 1915 (mistakenly printed at p. 183 "1914"), on the petition of the Hocking Valley Company to approve the sale of certain stocks and bonds, said (Rec., 184, 8, 190):

> "We cannot too often repeat that the prime purpose of our decree was to insure the complete separation of the railroad interests from the coal mining interests, so that the former should not and could not dominate the latter."

The title of appellants' petition was this:

> "Petition concerning the interest retained by the Hocking Valley Railway Company and the Central Union Trust Company as trustee, in the coal lands of the Buckeye Coal and Railway Company."

and the body of the petition presented fully that subject.

Appellant, the Buckeye Coal and Railway Company, is the same Buckeye Company which joined in the first

consolidated mortgage of the Hocking Valley Railway to secure the latter's bonds, the Buckeye Company thereby mortgaging its properties to further secure the Hocking Company's own railroad bonds, which bonds the Buckeye Company did not sign or otherwise obligate itself upon. This mortgage contains the two cents royalty provision about to be referred to, which is the principal basis of the present litigation.

Appellees' Motion and Brief in Support Thereof involve the Merits.

The present motion is one involving the merits of the case and to properly consider it would require an examination of the record, a statement of facts and many references to the record. That this is so is shown by the fact that the brief in support of appellees' motion to dismiss is made up largely of quotations from the opinion and decree from which we are appealing. Indeed, on page 2 of the motion and brief, appellees state:

> "The material facts are succinctly stated in the opinion of the court below filed January 18, 1924."

and thereupon the opinion is largely set forth.

It is expected that this case will soon be reached for hearing on the merits, and therefore apellants have already filed their brief on the merits, and that brief contains on the first sixteen pages thereof our statement of the case, of the material facts and the positions taken by both parties. Instead of now cumbering this brief with a restatement of the case we respectfully refer the court to the statement of the case as set out in our main brief.

For their statement of the case appellees refer, as above said, to the opinion in the case. In our main brief we comment on that opinion, show its inaccuracies and ask for its reversal. In thus seeking to found their mo-

tion on an opinion from which we have appealed and which we have criticized to the best of our ability in our main brief, it becomes clear that this is a motion to dismiss on the merits.

In passing we will say that our petition refers to the main decree in this case of March 14, 1914, sets out its provisions, refers to the reorganization in 1899, the making of the twenty million dollar mortgage, the clause by which the Railway Company retained the two cent per ton royalty on the coal belonging to the Railway Company and to other matters connected therewith. The answers thereto of the Hocking Valley Railroad Company and the Central Union Trust Company cover thirty pages of the record (Rec., 12-42) and the reply to those answers with four exhibits covers twenty pages of the record (42-62). We cannot make a synopsis of these pleadings shorter than the statement of the case contained in our main brief.

There is also set out in the petition, answers and reply the passing of the control of the Buckeye Company from the Railway Company to Jones in 1916, the position taken by the Buckeye Company thereafter on these questions, and certain proceedings in the State Court, all of which must be taken into consideration on this motion to dismiss.

The amount now in controversy, arising from the two cent royalty provision and now at issue between appellees and appellants is not set out in the present record, but it does appear that 3,741,189 tons of coal have been mined during the period of this dispute and no royalty paid thereon, which would amount to about $75,000, and it also appears from the affidavit of Duke (Rec., 109) that about eighteen million tons of mineable and recoverable

coal remain in the ground, which would involve the further sum of about $360,000.

Thus it is conclusively shown that it is not true that appellants have no personal financial interest to be protected by their petition, or that they have no private controversy with appellees, or that their private interests were disposed of by the Ohio courts, or that appellants have "intervened solely as informers to call attention to an alleged public interest." While a public interest may be involved and while there may be involved in this case questions concerning the unenforcibility of contracts against public policy, yet it is true that appellants have a large personal and private interest in the matter in controversy and that any attempt to put appellants in the position of simply trying to enforce a public right is entirely baseless.

For these reasons also the present motion should be overruled.

III.

Appellants have not usurped or attempted to usurp the functions of the United States, the District Attorney or the Attorney General.

It is not true, as stated by opposing counsel (Brief, p. 10) that appellants were permitted to file their petition "for the sole purpose of calling the court's attention to the alleged violation of, or failure to conform to, the terms of the final decree or to subsequent orders or decrees made in furtherance of that decree." The petition, answers and reply are general, unlimited and unconditional in character, except only so far as they may have been limited by their terms. The issues made by the present pleadings are broad in character and present the

whole subject matter of the interest in the coal lands retained by the Railway Company and the Trust Company. The United States, original complainant, has never objected to the intervention or suggested in any way that appellees were usurping or attempting to usurp its functions. The claim of opposing counsel in this respect is conclusively negatived by the attitude taken and continued by the United States (Rec., 74).

Respectfully submitted,

WILLIAM BURRY,
WILLIAM O. HENDERSON,
Counsel for Appellants.

April, 1925.

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Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

MOTION BY APPELLEES, THE HOCKING VALLEY RAILWAY COMPANY AND CENTRAL UNION TRUST COMPANY OF NEW YORK, TO DISMISS APPEAL.

ARTHUR H. VAN BRUNT,
Solicitor for Appellee, Central Union Trust Company of New York.

JOHN F. WILSON,
Solicitor for Appellee, The Hocking Valley Railway Company.

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vs.

THE HOCKING VALLEY RAILWAY COMPANY, CENTRAL UNION TRUST COMPANY OF NEW YORK, and UNITED STATES OF AMERICA,

Appellees.

Appeal From the District Court of the United States for the Southern District of Ohio, Eastern Division.

MOTION BY APPELLEES, THE HOCKING VALLEY RAILWAY COMPANY AND CENTRAL UNION TRUST COMPANY OF NEW YORK, TO DISMISS APPEAL.

Come now the appellees, The Hocking Valley Railway Company and Central Union Trust Company of New York, Trustee, and move to dismiss the appeal herein on the ground that it appears upon the face of the record that the appellants are without standing to prosecute an appeal to this Court.

STATEMENT.

The present appeal is taken by appellants from an order of the United States District Court for the Southern District of Ohio, Eastern Division, dismissing a petition filed by appellants by leave of said Court in a proceeding theretofore pending in said Court under the title *United States of America* v. *Lake Shore & Michigan Southern Railway Company, et al.*, In Equity, No. 1584. The material facts are succinctly stated in the opinion of the Court below, filed January 18, 1924 (R., 109-113):

> "In the year 1912 the United States began suit in equity herein against six railroad companies and three coal companies, named in the margin hereof,[1] to dissolve a combination alleged to violate the Sherman anti-trust act (July 2, 1890, c. 647, 26 Stat. 209). Our decree of March 14, 1914, declared the combination to be in violation of the Act, and ordered dissolution by the sale of the railway companies' interests in the stock of the Sunday Creek Company, the disposition of stock in the Kanawha & Michigan Railway Company, and otherwise, including the enjoining of the Lake Shore & Michigan Southern, the Toledo & Ohio Central, the Hocking Valley and the Chesapeake & Ohio Railroad Companies from owning or controlling any stock in the Sunday Creek Company, or any interest in any of the coal properties in which that company is interested. Jurisdiction of the cause was expressly retained by the decree for the purpose of making such other and further orders and decrees as might be neces-

[1] The Lake Shore & Michigan Southern Railway Company, the Chesapeake & Ohio Railway Company, the Hocking Valley Railway Company, the Toledo & Ohio Central Railway Company, the Kanawha & Michigan Railway Company, the Zanesville & Western Railway Company, The Sunday Creek Company, the Continental Coal Company, the Kanawha & Hocking Coal & Coke Company.

sary to the due execution of the decree of 1914, and the complete dissolution of the combination condemned thereby. A detailed history of the case will be found in the opinion of this court upon which that decree was based. *United States* v. *L. S. & M. S. Ry. Co., et al.*, 203 Fed. 295. Under that retention, orders have been made from time to time, as deemed necessary, to effectuate dissolution.

"When that decree was made the Hocking Valley Railway Company owned the entire of the capital stock of the Buckeye Coal & Railway Company (consisting of 2500 shares), all of which except five qualifying shares were held in pledge by the Central Trust Company, as trustee under the Hocking Valley Railway Company's First Consolidated Mortgage of 1899, by which mortgage the Buckeye Company had conveyed certain coal lands as further security for the payment of the Hocking Valley Railway Company's bonds secured by that mortgage, by the terms of which the Buckeye Company agreed to deliver, beginning July 1, 1900, yearly statements of coal mined, and to pay two cents per ton on such coal, to be used as a sinking fund for the purchase and cancellation to that extent of the mortgage bonds of the Hocking Valley Company.

"On May 19, 1916, upon application of the United States, this court made an order that the capital stock of the Buckeye Company be sold free and clear of the mortgage lien, and that the proceeds thereof be paid to the mortgage trustee to apply on the mortgage bonds (231 Fed. 1007). Under that order the Buckeye Company stock was sold to John S. Jones for $50,000 (in connection with the sale to him of the outstanding stock and bonds of the Ohio Land & Railway Company for $400,000), the sale being approved by this court upon presentation of the contract of sale between Jones, on the one part, and the Hocking Valley and Chesapeake & Ohio Railway Companies, on the other, and after taking the testimony of witnesses in open court relating to conformity of such

sale to the order of May 19, 1916, the reasonableness of the price paid, and the satisfactory status of the purchaser,—the mortgage trustee in connection therewith waiving its then pending appeal to the Supreme Court from the order of May 19, 1916. The contract between Jones and the railroad companies contained a recital of the inclusion in the Hocking Valley mortgage of the Buckeye real estate as such further security for the payment of the mortgage bonds, as well as the agreement in the mortgage for the payment by the Buckeye Company of the two cents per ton royalty on coal mined from its property so mortgaged. This recital was followed by express provision that the Hocking Valley Company should cause all the mortgaged property of that company to be first exhausted before any recourse under the mortgage to the property of the Buckeye Company; and that the Hocking Valley Company indemnify the Buckeye Company from any loss or damage to or payment by that company under the provisions of the mortgage 'save only said two cents per ton royalty above mentioned', and that nothing contained in said agreement was intended or should be construed in any-wise to limit, or affect or impair, the several covenants or obligations of the Buckeye Coal & Railway Company contained in said mortgage.

"After the purchase by Jones (who owned and owns all the Buckeye stock), the Buckeye Company failed and refused to carry out the provision for royalty payment. The mortgage trustee began suit in this court, in the year 1919, for the collection thereof, which suit is still pending and undetermined. In the same year the Buckeye Company instituted suit in a state common pleas court of Ohio to quiet its title against the claims of the mortgage trustee under the Hocking Valley mortgage. The Sunday Creek Coal Company of Ohio (not the original Sunday Creek Company), which had succeeded to the rights of the Buckeye Company in the lands, was made a party plaintiff. Upon final hearing upon issues joined, the Com-

mon Pleas Court dismissed the petition, adjudging that the mortgage 'and the covenants of the Buckeye Coal & Railway Company therein contained, are valid and binding obligations, and a good and valid lien upon the real property in said mortgage . . . described.' This decree was affirmed by the State Court of Appeals, the Supreme Court of Ohio declining to order the case certified for its review. Thereupon the Buckeye Company and the Sunday Creek Coal Company filed their petitions in this Court, asserting that the situation created by the Hocking Valley trust mortgage, including especially the two cents per ton royalty provision, was in violation of the decree of dissolution previously made by this court; and asking that the demand or collection of the two cents per ton royalty be enjoined, the lands of the Buckeye Company released from the mortgage, and particularly from section 9 thereof (which contains the royalty provision), or that all interests of the railway company and the mortgage trustee in the Buckeye property be sold, or such other and appropriate order as will 'effectively carry out the purpose and effect' of the decree of 1914. After issues joined on the petition, and before decision thereon, the United States filed its supplemental petition herein, asking that the Buckeye coal lands be released from the lien of the Hocking Valley mortgage and the Buckeye Company discharged from its obligation to pay the two cents per ton royalty, upon payment by the Buckeye Company, or its successors in interest, to the Hocking Valley's mortgage trustee the reasonable value of the rights of the trustee, to be judicially ascertained; and on the ground that the situation created by such lien and royalty provision violates the anti-trust act and contravenes the original decree of dissolution made herein. It will be observed that the substantial difference between the petitions of the coal companies and the Government, respectively, is that the one asks such release without, the other upon, compensation to the mortgage trustee."

Matters of evidence referred to in the foregoing statements of facts appear in the record herein as follows:

Final Decree of March 14, 1914 (R., 165).

Material portions of First Consolidated Mortgage, March 1, 1899, The Hocking Valley Railway Company and The Buckeye Coal and Railway Company to Central Trust Company of New York, Trustee (R., 215-220).

Order of May 19, 1916, directing sale of capital stock of The Buckeye Coal and Railway Company (R., 201-209).

Contract, October 7, 1916, for sale of The Buckeye Coal and Railway Company stock to John S. Jones (R., 57-62).

Order approving sale under contract of October 7, 1916, and order directing entry thereof (R., 212-213).

Admission of non-payment of royalties (R., 45).

Upon the foregoing facts the Court below reached conclusions which were clearly and concisely stated in the opinion of the Court as follows (R., 113-115):

> "So far as concerns the petition of the Buckeye Company and the Sunday Creek Company, we think it clear that relief should be denied. While our jurisdiction generally to make such further orders and decrees as should be necessary to the due execution of our main decree, and the complete dissolution of the condemned combination, continued without abatement until such complete dissolution should be effected (*United States* v. *L. S. & M. S. Ry. Co. et al., supra*), there is perhaps substantial force in the thought that the order of this court of May 19, 1916, and the sale of the Buckeye Company's stock thereunder, exhausted the jurisdiction of this court over the specific question whether the situation created by the lien of the Hocking Valley mortgage upon the Buckeye Company's lands, given to secure the

Railroad's indebtedness, in connection with the tonnage royalty provision, was so far unlawful as to require its elimination. This court approved the sale of the stock to Jones with full knowledge of the fact situation now complained of, and presumably without its occurring to either court or Government's counsel that the situation created a substantial interference with the free competition aimed at by the original decree. The action taken might not improperly be thought to carry a tacit implication that the situation here presented was not then regarded open to criticism. But wholly apart from this consideration, and without passing upon its merits, we think relief forbidden by these further considerations: In the first place, assuming for the purposes of this opinion, that the petitioning coal companies have a legal interest in the elimination of the alleged unlawful feature, we see no reason to doubt that, as between the two original petitioners and the Hocking Valley Company and its mortgage trustee, the decree of the state court binds both the Buckeye Company and the Sunday Creek Company as an adjudication of the complete validity of the mortgage as against the attacks now made upon it. Again, this is a proceeding in equity, and it is manifestly inequitable that either Jones or those standing in his right escape liability for a situation assumed by them, and, as we must find, then recognized as of binding force, and whose assumption seems fairly to have been part of the consideration paid by Jones for the Buckeye stock. In the situation presented, we think the petitioning coal companies cannot be heard to say that payment of the royalty, or the continuance of the mortgage lien upon the lands of the Buckeye Company, would violate the law. The fact that the Government did not answer or take issue upon the coal companies' petition cannot alter the result otherwise reached. The petition of the coal companies must be denied.

"The Government's supplemental petition rests upon a different foundation. It is conceded that the decision of the Supreme Court in the Reading

case (*Continental Coal Co.* v. *United States*, 259 U. S. 156), announced about six years after the sale to Jones of the Buckeye stock, and shortly before the filing of the Government's supplemental petition before us, suggested to Government's counsel the invalidity of the situation we are considering. It was eminently proper that the Government bring this situation before the Court, and afford opportunity for such action, if any, as should seem to be called for. But we are not impressed that the situation calls for the relief asked. Again passing without decision the question of the exhausting of jurisdiction of this court over the subject-matter of the supplemental petition, by the action had in the sale to Jones, it seems plain that even in view of the Reading decision the criticized situation is not so clearly improper, nor so substantial, as to justify the action which the Government now asks. Whatever theoretically potential interference with free competition might otherwise be created by the railroad-mortgage lien upon the Buckeye lands in connection with the royalty tonnage provision, we think such interference practically reduced to a minimum by the fact that by the contract between Jones and the railroad companies the railroad property must first be exhausted before resort can be had to the coal lands, in connection with the fact that no suggestion is made that the railroad property is not entirely adequate to meet the payment of the mortgage in full, and the payment of the mortgage puts an end to the royalty. Indeed, an affirmative inference, more or less strong, in favor of the adequacy of the railroad security seems fairly deducible from the record presented to us. We therefore think that it will be time enough to question the invalidity of the situation we are discussing when, if ever, it becomes acute.

"We are accordingly constrained to dismiss the Government's supplemental petition. The dismissal, however, will be without prejudice to its right to make further application for relief, when, if ever, the situation may be thought to justify it, in view of the considerations we have stated."

ARGUMENT.

I.

The Appellants, Having Intervened Solely as Informers to Call Attention to an Alleged Public Interest, Acquired No Status as Litigants.

The appellants sought to file their petition solely to protect an alleged public interest and in order to "effectively carry out the purpose and effect of the main decree" (Appellants' petition, R., 7-11, Appellants' reply, R., 44-45). The appellants' pleadings expressly admit that their private controversy with the appellees was previously disposed of in proceedings in the Ohio State Courts (R., 11, 44). Their application to intervene might therefore have been denied by the Court below on the authority of *United States* v. *Northern Securities Company, et al.*, 128 Fed. 808, where the Court said:

> "The application for leave to intervene contains the further suggestion, made on information and belief only, that the proposed plan of disposing of the stock of the Northern Pacific and Great Northern Railways Companies would result in leaving the control of the two railroads in the hands of persons who cooperated in forming the Securities Company, and that the petitioners should be permitted to intervene and obtain further order to prevent such a result. . . . The United States is the complainant in this case. It is the conservator of the public welfare and has a right to speak for the public. According to well established rules, the petitioners cannot intrude into this litigation merely to protect the public interest or as *amici curiae* so long as the Govern-

> ment is present by its Attorney General and expresses its disapproval of such intrusion. This would be wresting from the Government that control over the litigation, so far as the public is concerned, which it has a right to exercise. The petitioners can intervene only for the protection of their own individual interests, and for that purpose only in the event that they can obtain adequate protection in no other way."

They were, however, permitted to intervene in the anti-trust suit but for the sole purpose of calling the Court's attention to alleged violations of, or failure to conform to, the terms of its final decree or of subsequent orders or decrees made in furtherance of that decree. Their capacity was merely that of informers.

The appellants' effort was, in effect, to secure, by intervention in the anti-trust suit, the benefits of an independent suit in equity, seeking, upon the pretext of public interest, an injunction against an alleged violation of the Anti-Trust Act.

It is unnecessary to do more than refer to a few of the numerous authorities in this Court to the effect that the right to seek and obtain injunctive relief for public wrongs under the Anti-Trust Acts is confined to suits in equity by the United States under the direction of the Attorney General.

> *Minnesota* v. *Northern Securities Company*, 194 U. S. 48, at page 70.
>
> *Wilder Manufacturing Company* v. *Corn Products Refining Company*, 236 U. S. 165, at page 174.

Paine Lumber Company v. *Neal*, 244 U. S. 459, at page 471.

Geddes v. *Anaconda Copper Mining Company*, 254 U. S. 590, at page 593.

General Investment Company v. *Lake Shore & Michigan Southern Railway*, 260 U. S. 261, at page 286.

The appellants could not avoid the force of these decisions by intervening in the suit of the United States. Their intervention gave them no status as litigants in that proceeding and any order entered upon their petition would be solely for the protection of the public interest.

II.

The Original Complainant, the United States, Having Assumed the Protection of the Public Interest by Supplemental Petition, and Having Acquiesced in the Denial Thereof, the Appellants Cannot Usurp the Function of the Attorney General by Prosecuting an Appeal in the Public Interest.

When appellants' petition came on for hearing on June 5, 1922, the complainant, the United States, at first declined to participate in the proceeding on the ground that the public interest was too remote (R., 74). Subsequently, however, but before a decision was rendered on appellants' petition, the United States filed a supplemental petition (R., 62-72) alleging the same facts and

asking for substantially the same relief. The appellants' function as informers, if it ever had a valid basis, ceased when the United States itself undertook the protection of the alleged public interest. The Court dismissed both petitions and the United States, the sole official and rightful conservator of the public welfare, has accepted that dismissal. It has not appealed therefrom. The appellants cannot usurp the function of the Attorney General by prosecuting in the public interest an appeal from an order in which he has elected to acquiesce.

United States v. *Northern Securities Company, supra.*

The appellate jurisdiction of this Court can only be invoked by a party having a personal interest in the litigation.

Smith v. *Indiana,* 191 U. S. 138.
McCandless v. *Pratt,* 211 U. S. 437.

The cases just cited also establish that one seeking to prosecute an appeal in behalf of a public interest does not have the requisite standing to maintain such appeal merely because he is a member of the public whose interest he seeks to assert and that in the absence of such standing the appeal will be dismissed by this Court.

III.

The Appellants, Having No Standing to Appeal in the Public Interest, and Their Private Interests Having Been Finally Adjudicated by a Court of Competent Jurisdiction, the Decision of the Court Below Was Not a Final Determination of Any Substantial Right of the Appellants, and They Therefore Have No Standing to Appeal.

The present appeal is maintainable only under the provisions of Section 2 of the Expedition Act, 32 Stat. 823, 36 Stat. 854, under which an appeal to this Court lies only from the *final decree* of the court below. An adjudication is not final in such sense as to be appealable unless it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief except by recourse to an appeal.

> *Odell* v. *Batterman Company,* 223 Fed. 292-295.
>
> *American Brake Shoe & Foundry Company* v. *New York Railways Company,* 282 Fed. 523-527.

As above pointed out, no right of the appellants was asserted by their petition or was in any way denied or involved in its dismissal. The public right asserted in their petition was not *their* right. Their private rights had been finally determined by the Ohio Courts. The order of dismissal was therefore not a final decree of the court below from which they were entitled to appeal.

IV.

Authorities Permitting, in Equity Suits Brought by the United States under the Anti-Trust Act, Intervention for the Protection of Private Interests and Recognizing a Right of Appeal in Such Intervenors, Have No Application to the Present Case.

We of course do not assert that one may never, in an equity suit brought by the Government under the Anti-Trust Act, intervene for the protection of his private rights, or that he may not have an appeal from a denial of the rights which he asserts. Such intervention was permitted in the court of first instance in *Continental Insurance Company* v. *U. S.*, 259 U. S. 156, and in *Terminal Railroad Association* v. *U. S.*, 45 Supreme Court Reporter 5 (not yet officially reported), and an appeal by the intervenors was heard by this Court in *Continental Insurance Company* v. *U. S., supra.* But the present case is quite different. These appellants were concluded by the decision of the State courts of Ohio, to which they saw fit to submit the determination of their private rights. They were estopped by the express terms of the contract of October 7, 1916 (R., 57-62) which Jones, their sole stockholder, signed, which he cooperated in submitting to the court below and which that court approved. They thereby forfeited any standing they might otherwise have had seasonably to present their private interests to that court and to appeal from its decision. They sought to intervene for the protection of the public interest only and such intervention, as we have shown, gave them no right of appeal to this Court.

V.

The Motion to Dismiss Should Be Granted.

March, 1925.

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